DOCUMENT RESUME

ED 375 922 PS 022 425

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TITLE Legal Barriers to Volunteer Service: A Community Service Brief.
INSTITUTION Nonprofit Risk Management Center, Washington, DC.
PUB DATE 94
NOTE 34p.
AVAILABLE FROM Nonprofit Risk Management Center, 1001 Connecticut Avenue, N.W., Suite 900, Washington, DC 20036 ($1 plus $3 shipping and handling for the first item plus $.50 for each additional item, $5 maximum).
PUB TYPE Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Compensation (Remuneration); Court Litigation; *Definitions; *Employees; Federal Regulation; *Labor Legislation; *Legal Problems; Minimum Wage Legislation; Public Agencies; State Standards; Voluntary Agencies; *Volunteers
IDENTIFIERS *Davis Bacon Act; *Fair Labor Standards Act

ABSTRACT

This booklet is designed to help public and private community service organizations understand the applicability of wage and hour laws to volunteers used in their activities. It considers various legal interpretations of the differences between "volunteers" and "employees," and reviews the provisions of the federal Fair Labor Standards Act (FLSA), adopted in the 1930s to prevent the exploitation of workers by public and private enterprises. The booklet lists five FLSA criteria that may indicate a volunteer qualifies as an employee for the purposes of FLSA wage and hour protection: (1) receipt of compensation for services provided; (2) displacement of paid workers; (3) voluntary work for an employer that is essentially the same work as that performed for compensation; (4) economic dependency on the organization for which the volunteer service is provided; and (5) the performance of tasks for the benefit of the organization itself rather than the community the organization serves. The booklet also reviews the applicability of the Davis-Bacon Act for volunteers engaged in construction, maintenance, repair, painting, and decorating of certain federally funded projects. Specific court cases and examples are cited. (Contains 36 legal citations.) (MDM)

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Legal Barriers to Volunteer Service

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This publication is part of a series on legal liability, insurance, and risk management for community-serving organizations. The series is designed to serve three major purposes: provide guidance on resolution of legal issues; suggest strategies that program managers can implement to prevent legal problems from hampering their operations; and offer suggestions for modifying laws that may inhibit national and community service.

All opinions expressed in this booklet are those of the authors on behalf of the Nonprofit Risk Management Center. They do not necessarily reflect the official position of the Corporation for National and Community Service.

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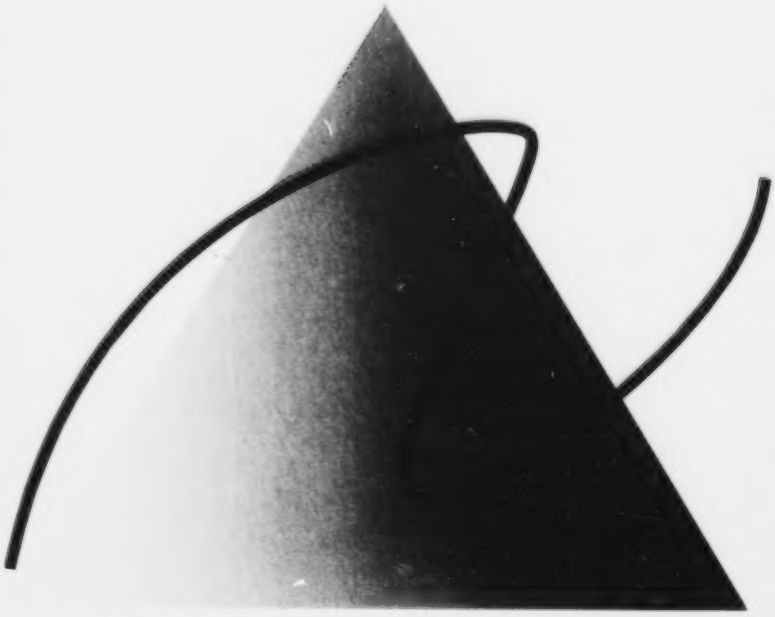
Legal Barriers to Volunteer Service

a community service brief



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Acknowledgments

The authors thank the following individuals for their helpful suggestions on this *Community Service Brief*.

Winnifred Brown, New York City Mayor's Voluntary Action Center
Brad Cattel, National Economic Development and Law Center
Bernice Figueredo, Jackson, Lewis, Schnitzler & Krupman
Carol Friedland, New York City Mayor's Voluntary Action Center
Jane Kenny
Andrew O. Moore, National Association of Service and Conservation Corps
Jennifer Phillips, Milwaukee Community Service Corps
Pamela Poff, Jackson, Lewis, Schnitzler & Krupman
Bradford W. Warbasse, Gordon, Feinblatt, Rothman, Hoffberger and Hollander
Steven Willborn, University of Nebraska College of Law

With special thanks to Harvey Dale and Sandra Agan of the New York University Program on Philanthropy and the Law.

Community Service Brief Review Panel
William C. Basl, Washington Service Corps
Mike Brown, City Year
Irene Fisher, Lowell Bennion Community Service Center
Margaret O'Neill, Student Service Alliance

Contents

Introduction **1**
Wage and Hour Laws **3**
Volunteer Or Employee? 4
"Pure" Volunteers 5
Official Guidelines 5
Benefit 6
Training 7
Competition 7
Compensation 7
Economic Dependence 8
Employee-Volunteers 10
FLSA Applicability 12
Construction, Maintenance, Repair, Painting and Decorating **14**
Davis-Bacon Applicability 15
Davis-Bacon Implications for Volunteer Programs 18
Union Rules **20**
Non-citizens **21**
Conclusion **22**
Footnotes **23**

Introduction

Volunteers can do anything!

That slogan may be great for building volunteer spirit, but the law says otherwise. Several federal and state statutes have the effect of prohibiting the use of volunteers in a few situations. Although these laws have little to do with most volunteer service, we examine them here to alert you to potential pitfalls and to assure you if your program is unaffected by any of these laws.

Most of these laws make no reference to volunteers *per se*. Instead, they require that individuals performing certain tasks be paid specific amounts for their labor. If these laws apply, individuals *must* be paid, even if they want to volunteer.

Many of these laws were passed during the Depression to protect workers from exploitation. Their enforcement to restrict the use of volunteers may now conflict with public policy. Nonetheless, these laws remain on the books and can be enforced.

The purpose of this booklet is to explain these rules so you do not violate them unintentionally. In addition, the information here may help you to work to change laws that inappropriately limit the use of volunteers.

At the outset, a brief word about terminology is necessary. As you will see, the applicability of many of the laws depends on whether an individual you consider to be a "volunteer" is classified as an "employee" under a particular law. An individual you refer to as a "volunteer," "participant," "gratuitous employee" or "intern" may be subject to employment laws and standards.

To minimize confusion, we use "employee" throughout this booklet to refer to someone covered by the employment law

at issue, whether or not you consider that person to be a volunteer. We use "volunteer" as loosely here as it is used among volunteer programs to mean anyone ordinarily thought of as a volunteer. We recognize that some volunteers function much like employees and some receive stipends or other supports that might be considered compensation. The task here is to help you determine whether specific employment laws apply to any of these volunteers.

The applicability of employment laws to volunteers can be especially confusing because an individual may be considered to be an employee for one law but not another. For example, the Internal Revenue Code uses different rules for distinguishing between employees and independent contractors than the Fair Labor Standards Act uses for determining whether someone must be paid the minimum wage. Similarly, a state child labor law may be interpreted to cover volunteers even if the federal law does not.

While we have attempted to make our work as thorough and accurate as possible, this booklet cannot provide exhaustive or definitive answers for many of the questions it addresses. The law simply does not permit such certainty. Our goal is to give you as much of the answer as possible under these conditions. You may still need to consult a lawyer for an opinion regarding your specific circumstances. If so, this booklet should be a time-saving tool for your attorney. We have included footnotes for attorneys' use.

If you spot an error or omission in this booklet, or if you have ideas for operating in ways that minimize the negative effects of any law on your program, please notify the authors. Our chief objective is to provide the best possible guidance to the field, and that includes a commitment to update the material in this booklet as needed. Please let us know how we can make these materials more useful for you and share your knowledge with us so other programs can learn from your experience.

Wage and Hour Laws

Wage and hour laws are designed to protect workers from exploitation by employers that would otherwise pay too little or force employees to work too long. The federal law and similar state laws set a minimum wage and require overtime pay at higher rates for long hours. These laws contain certain safeguards designed to prevent employers from circumventing the rules by requiring workers to "volunteer." Because the rules are a bit overinclusive, they may require payment of the minimum wage (or overtime) in some circumstances that are intended to be true volunteer activities.

Traditional wage and hour laws have no bearing on traditional volunteer service. The United States Supreme Court has cited approvingly the Department of Labor's position that altruistic citizens who volunteer to "minister to the comfort of the sick, elderly, indigent, infirm, or handicapped, and those who work with retarded or disadvantaged youth" are exempt from minimum wage and maximum hours laws in almost all circumstances.[1]

In several situations, though, the federal Fair Labor Standards Act (FLSA) or other legislation may prohibit individuals from conducting certain activities unless they are paid. The FLSA prescribes minimum wage and compensation rates for most employees and provides for enforcement proceedings and sanctions against employers who violate its requirements.[2] It is administered by the United States Department of Labor. In addition to the FLSA, states have their own wage and hour laws. Some state laws, though, apply to broader categories of workers, impose additional requirements, or may otherwise impinge on volunteer programs. In these states, the more expansive law will apply.

Our review of the FLSA, its regulations, and explanatory

materials published by the U.S. Department of Labor has identified five criteria which can convert a volunteer into an employee for the purposes of FLSA wage and hour protection. As explained in more detail below, individuals who have any of the characteristics listed below *may* be considered to be employees under the FLSA.

Characteristics That *May* Trigger the Fair Labor Standards Act

1) Receives some compensation, whether monetary or in-kind for performing service.
2) Displaces paid workers, provides services in competition with paid workers, or otherwise impairs the employment prospects of paid workers.
3) Volunteers for his or her own employer and does the same type of work done for the regular job.
4) Is economically dependent on the organization for which the volunteer service is performed.
5) Performs tasks that benefit the organization itself rather than the community the organization serves.

If your volunteers have any of these characteristics, you should read the remainder of this section.

Volunteer Or Employee?

Fair Labor Standards Act (FLSA) requirements apply only to individuals considered to be "employees" of an "enterprise" engaged in interstate commerce.[3] Most organizations, including all governmental entities, are considered to be "enterprises" engaged in interstate commerce. To determine if your organization is an "enterprise," see the "FLSA Applicability" section below.

The Fair Labor Standards Act does not specify the characteristics we identified. Instead, it distinguishes generally be-

tween "employees" and "volunteers." The Act itself offers little guidance for determining whether someone is an employee or a volunteer. It does not define "volunteer" and defines "employee" as "any individual employed by the employer." "Employ" is defined as "to suffer or permit to work."[4] The factors we identify here represent an attempt to systematize the results of the Department's rulings and judicial opinions.

"Pure" Volunteers

The Department of Labor acknowledges that some individuals offer services as "pure" volunteers, and that those individuals are indeed exempt from FLSA coverage. Department of Labor regulations most clearly exempt almost all public sector volunteers from the Fair Labor Standards Act. Individuals who perform services for a public agency (a unit of state or local government) for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, are not considered to be employees under the FLSA.[5] (But see "Employee-Volunteers," below.)

In general, according to the Department of Labor, the FLSA does *not* apply to volunteers who:

1) are working toward "public service, religious, or humanitarian objectives,"
2) are not displacing employees when performing these services, and
3) are donating services not generally considered to be compensable "work."

As examples, Labor lists the following: student volunteers at hospitals and nursing homes, parents helping in their children's schools, and camp counselors.[6]

Official Guidelines

The Department of Labor does not consider all volunteers to be "pure" volunteers. The Wage and Hour Administrator of the Department of Labor will look beyond the "volunteer" label

to determine whether an employment relationship exists for purposes of FLSA protection. Labor will scrutinize the following four elements of the relationship.

1) Benefit,
2) Training,
3) Competition, and
4) Compensation.[7]

Benefit

In any volunteer situation, the question, "Who benefits?," provides a sensible, but difficult to apply, basis for deciding whether wage and hour laws apply. The less benefit to the organization (employer) and greater the nonmonetary benefits to the individual and the community, the higher the likelihood of an exemption. At one end of the spectrum are volunteers like hot line counselors who directly help needy individuals. At the other end of the spectrum are assembly line workers who help an automobile manufacturer to make a profit. Business sector workers are considered employees (unless a specific training or apprentice exception applies) because their employer is the beneficiary of their labor. This remains true even if the workers themselves derive psychological gratification from the job. Similarly, volunteers who conduct unrelated commercial activities on behalf of a nonprofit organization are likely to be covered because the organization and not the community directly benefits from the service.[8]

In between are volunteers whose services help an organization but do not directly benefit the public. Who derives the benefit of services provided by someone who maintains the books for a soup kitchen or by an individual who files medical forms at a free clinic? If the relationship between the volunteer's services and a benefit to the community is unclear, the Department of Labor may conclude that the organization is the beneficiary. If so, aggressive application of the rules might require payment of the minimum wage.

Training

If volunteers receive substantial training and education as part of their volunteer assignment, the position is less likely it is to be viewed as employment. (Department of Labor guidelines use vocational school training as an exemption example.[9]) One critical factor is whether the training is specific to the needs of the employer or would be useful for other jobs. Discussions of training tend to be lumped together with the question of "who benefits?" Substantial training that can be used to perform other jobs tends to indicate that the position is for the benefit of the volunteer.

Competition

If a volunteer's activities compete with, substitute for, or replace in any way the employment of paid workers, the FLSA is more likely to apply. A business or organization may not reduce its paid labor force by taking on volunteers. In such situations, the Department of Labor may step in to protect jobs.

Compensation

Compensation in any form tends to indicate an employment relationship, but FLSA provisions allow "reasonable benefits" for volunteers. For example, regulations regarding volunteers for public agencies provide that "benefits would be considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or pension plans or 'length of service' awards, commonly or traditionally provided to volunteers of State and local government agencies."[10] Although these rules appear in regulations for public sector employees, nothing suggests that they do not apply to volunteers for charitable organizations as well. The Department of Labor reserves the right to analyze the compensation offered in exchange for volunteer services and states that whether such payments would cause the recipients to lose their volunteer status "must be determined by examining the total

amount of payments in the context of the economic realities of the particular situation."[11] With respect to trainees, the Department of Labor *Field Operations Handbook* provides that "mere payment of a scholarship, stipend, or allowance (as long as it does not exceed a reasonable approximation of the expenses incurred by the trainee taking the course or where it serves as an allowance for subsistence) will not be considered to establish an employment relationship."[12]

Providing cash in the form of a stipend rather than a wage, though, does not automatically exempt it from the minimum wage law. To the contrary, paying some compensation creates an inference that the FLSA applies. An exception, if one can be found, must rest on the other factors discussed here or, for federally funded programs, on an exception in the law authorizing the program.

Economic Dependence

In 1985, the United States Supreme Court addressed the volunteer/employee issue in the case of *Tony and Susan Alamo Foundation v. Secretary of Labor*.[13] That case holds that if an individual who performs service for an organization is dependent on that organization for sustenance, the Fair Labor Standards Act wage and hour rules apply.

To the extent your program resembles the circumstances in *Alamo*, the Court's analysis will govern. Because *Alamo* is a judicial decision rather than a set of regulations, though, it does not offer a simple test for every situation. The facts of the case limit the generalizability of its conclusion.

The Alamo Foundation was incorporated as a nonprofit religious organization for the purpose of rendering assistance to the needy and the sick. As part of its mission, the Foundation operated various commercial businesses including service stations, clothing and grocery stores, and a motel. Members who volunteered to work for the Foundation were called "associates." Many were former drug addicts or had criminal records and were being rehabilitated by the Foundation while staffing its commercial businesses. Associates received no cash pay-

ments for the work they performed. However, they did receive food, clothing, lodging, transportation and medical benefits.

The Supreme Court noted that the Alamo Foundation associates were entirely dependent on the Foundation for food and shelter for long periods of time, in some cases several years. Thus, as a matter of "economic reality" they were employees and not volunteers. Therefore, the Foundation was required to pay them minimum wage and overtime.[14]

Significantly, the Court clearly viewed as irrelevant the strong protestations by the associates that they were not employees and that they did not expect compensation. A worker cannot waive any of the FLSA's provisions.[15] It also did not matter that the associates never received "cash wages." According to the Court, food and shelter are "wages in another form" and nothing in the FLSA limits its coverage to monetary compensation.

Despite its holding in *Alamo*, the Court was careful to note that its ruling was not intended to extend the FLSA to "ordinary volunteerism." According to the Court, "ordinary volunteerism" is service that does not "contemplate compensation" in any form (cash or benefits) and would include such activities as "driving the elderly to work" or "serving at soup kitchens".[16]

In the wake of *Alamo*, the Department of Labor asserted that Salvation Army participants in a "down and out work therapy program" were employees subject to the FLSA. The Salvation Army workers were therapy participants; many homeless, alcoholic or addicted to drugs. They helped sort donated items and in turn received food, shelter, counseling and a small weekly cash stipend.

The Salvation Army filed suit to enjoin the Department of Labor's proposed action which would have resulted in the payment of standard wages to an estimated 70,000 participants enrolled in the work therapy program. At that point the Department of Labor abandoned its enforcement action and the Salvation Army dismissed its suit.

Dismissal of the suit leaves the breadth of the *Alamo* holding in question. The rule of thumb continues to be that the more a volunteer's circumstances resemble those of a paid

worker, the stronger the grounds for applying the FLSA. The various rules described above, the *Alamo* case, and the near absence of Department of Labor enforcement actions since that case all suggest that volunteer programs have considerable latitude to engage volunteers in productive labor that benefits the community unless the program violates a specific prohibition or the relationship is functionally equivalent to a paid job.

Employee-Volunteers

In contrast to the muddy rules for determining whether the types of volunteer service discussed above are subject to the FLSA, the rules are very clear for individuals who volunteer for their employer. Multi-part tests elaborate the general rule, which is designed to prevent employers from pressuring their employees to volunteer for overtime duty and thereby get around minimum wage and maximum hour laws.

For private sector employees, the Department of Labor has issued a six part test.

1) The services are entirely voluntary, with no coercion by the employer, no promise of advancement, and no penalty for not volunteering.
2) The activities are predominantly for the employee's own benefit.
3) The employee does not replace another employee or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees.
4) The employee serves without contemplation of pay.
5) The activity does not take place during the employee's regular working hours or scheduled overtime hours.
6) The volunteer time is insubstantial in relation to the employee's regular hours.[17]

For public sector employees, the rules are a bit more complicated. A public sector employee can volunteer if:

1) the individual receives no compensation for the volunteer assignment, and

2) the assignment does not involve the "same type of service" that the individual is employed to perform. [18]

"SAME TYPE OF SERVICES"?

Whether an employee performs the "same type of services" on a volunteer assignment is determined on a case by case basis. According to the Department of Labor, the determination should involve an examination of "whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee." Labor uses its *Dictionary of Occupational Titles* for making that determination. You can check the definitions contained in this dictionary to determine whether employee—volunteers are performing the "same type of service" as that for which they are employed.

According to the Department of Labor the following situations would *not* be considered the "same type of service" and would thus be permissible volunteer activity.

1) A city police officer who volunteers as a part time referee in a basketball league sponsored by the city,

2) An employee of the city parks department who serves as a volunteer city fire fighter; and

3) An office employee of a city hospital or other health care institution who volunteers to spend time with a disabled or elderly person in the same institution during off duty hours.

"SAME AGENCY"?

For government employees, a volunteer assignment involving the same type of service for another public entity may or may not be permissible. The key here is to determine whether the other public entity is considered to be the "same agency" as

the volunteer's employer. If the two entities are in different levels of government, there is no problem (for example, a municipal employee wants to volunteer at a state facility). Where both are part of the same governmental structure, the answer is not always clear (for example, what about an employee of the state department of social services who wants to volunteer in a state run health facility).

Volunteering Not Allowed

A nurse in a state-run hospital wishes to provide patient therapy at a neighborhood health clinic that is administered by the state. Under the state's public health system, the clinic would not be considered a "separate public agency." If the nurse conducts patient therapy as part of her regular job, she would be considered to be performing the "same type of services" and thus would be covered by the FLSA.

The starting place for such a determination will be the organizational make-up of your state's executive branch. The federal Department of Labor regulations treat agencies separately if they are treated separately for statistical purposes in a census of government issued by the United States Bureau of the Census.

FLSA Applicability

As mentioned in the introduction to this section, the FLSA does not apply to all organizations. Rather, it applies only to organizations which are considered, to be "enterprises" engaged in interstate commerce. For an organization to be considered an enterprise or to be engaged in commerce, the Act provides that the organization must consist of at least two employees engaged in commerce, or in the production of goods for commerce or must have two employees handling, moving or selling goods which had previously moved in interstate commerce. [19]

Under the FLSA, every public agency is considered to engage in interstate commerce and to be subject to FLSA wage and hour laws. For nonpublic organizations, the test is whether the organization's activities are sufficiently closely related to commercial activities that cross state lines, even if the organization does not consider its activities to be commercial.[20] Nonprofit organizations that are subject to the Fair Labor Standards Act specifically include certain schools and religious organizations, hospitals, nursing homes, halfway houses, residential centers for drug addicts and alcoholics, homes for the blind and nursing homes.[21] If your organization is involved in some form of commercial activity it is highly likely that it is an "enterprise" subject to the FLSA.

The FLSA does contain an exception for employees engaged in wholly charitable activities of nonprofit organizations. However, this is a very narrow exception. If volunteers perform services that represent production of goods for interstate commerce, including any that are closely related to a process or occupation directly essential to such production, they will be considered to be acting as employees and thus be subject to FLSA standards. An office worker who handles the mail-order division which sells the organization's T-shirts and mugs could be covered by the FLSA. Similarly, if the services performed serve the general public in competition with ordinary commercial enterprises, then the workers will likewise be considered employees.[22]

Another set of exemptions known as the "white collar exemptions" apply to persons who serve in an executive, administrative or professional capacity. Individuals who fit into this category, including teachers, outside sales people and others, are exempt from FLSA minimum wage and overtime requirements if they spend sixty percent or more of their work time each week in executive or administrative activities.[23] These employees can serve their employers as volunteers even if they do the same type of work.

Construction, Maintenance, Repair, Painting and Decorating

The federal Davis–Bacon Act[24] requires that workers doing any form of construction, maintenance, repair, painting and decorating on certain federally funded projects be paid the local "prevailing wage." This rule applies regardless of whether the workers consider themselves—or want to be—volunteers.[25] The Davis–Bacon Act was passed during the Depression to prevent migrant workers from undercutting local labor in the construction and building trades industries. As applied today it has the effect of barring the use of volunteers in some situations.

At least 41 states have their own version of the Davis–Bacon Act covering state-funded projects.[26] Although the various state statutes closely parallel the federal Act, each has differences. If your volunteer program is involved in the types of activity discussed in this section and you receive state funding, you should determine whether your state law applies even if you are not subject to the federal Davis–Bacon Act. A project receiving both federal and state funds may be subject to two statutes.

The Davis–Bacon Act applies only to programs that have workers involved in the following types of activities.

Davis–Bacon Activities

Construction
Maintenance
Repair
Painting/Decorating

If none of your volunteers are involved in any of these activities, Davis–Bacon does not apply. When you try to determine whether your work involves any of these activities, be aware that the Department of Labor interprets each item very broadly. If staff

engage in these activities you could be subject to the Davis–Bacon Act in any of the following situations.

1. Work is performed on the site of a "public building or public works project" under a federal contract worth over $2,000.
2. Work is performed on the site of a "public building or public works project" and you are a subcontractor of a contractor that is subject to Davis–Bacon.
3. Funds for the work are provided by a federal program that imposes the Davis–Bacon Act requirements.

The analysis below can help you determine whether any of these conditions applies to your program. Because there is no case law on the applicability of Davis–Bacon to volunteer programs *per se*, the answer may not be clear. To be certain you or your attorney may seek guidance from the Department of Labor, which has a history of interpreting the Act as applying very broadly. The Department f Labor Wage and Hour Division issues Opinion Letters to give guidance to groups with Davis–Bacon questions. The Department's interpretation takes precedence over all other government agencies on issues of Davis–Bacon interpretation and coverage.[27]

Davis–Bacon Applicability

Scenario 1 Work is performed on the site of a "public building or public works project" under a federal contract worth over $2,000.

The Davis–Bacon Act applies to contracts (or grants) in excess of $2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair "of public buildings or public works of the United States or the District of Columbia."[28] If you receive such funding for a project, you cannot use volunteers for construction, etc., if they will be performing the work on the site of a public building or public works project as defined for purposes of the Act.

Public Building or Public Works Project—The phrases "public building" and "public works" refer to "any building or work, the construction, prosecution, completion or repair of which, is carried on directly by authority or with funds of a federal agency to serve the interests of the general public, regardless of whether title to the building or work is in a federal agency."[29]

A "public building" can be a federal building (such as a courthouse or federal office building) or it can be any other type of building the construction etc., of which is being financed in whole or in part by the federal government. The phrase "public works" usually refers to some form of public construction other than a building (such as a highway or a park) where the United States is a party or is financing, in whole or in part, the construction, repair, etc.

"On-Site"—The Davis–Bacon Act's prevailing wage requirement applies only to workers conducting covered activities directly at the physical construction site or at certain specifically defined "off-site" locations described in Department of Labor regulations. The term "site" is given a very expansive common sense definition.

Scenario 2 Work is performed on the site of a "public building or public works project" and you are a subcontractor of a contractor that is subject to Davis–Bacon.

The Davis–Bacon Act requires contractors *and subcontractors* to comply with its provisions.[30] Thus, you may be subject to Davis–Bacon even though you receive no federal funding. If you are performing services under a contract with another party that is subject to Davis–Bacon, then you, too, are required to pay the prevailing wage to anyone doing construction, etc., on the site of a "public building or public works project" according to the same rules explained above for direct recipients of federal funding.

Scenario 3 Funds for the work are provided by a federal program that imposes the Davis–Bacon Act requirements.

Over 50 federal statutes expressly require grantees to comply with the Davis–Bacon Act and related laws.[31] Statutes which "reference" the Davis–Bacon Act are not limited to the federal "site" limitation on the applicability of the Act. For example, the Domestic Volunteer Service Act contains the following rule:

> All laborers and mechanics employed by contractors or subcontractors in the construction, alteration or repair, including painting and decorating of projects, buildings and works which are federally assisted under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality....[32]

Because of this rule, Foster Grandparent Programs, Retired Senior Volunteer Programs, and other programs funded under the Domestic Volunteer Service Act have been subject to Davis–Bacon Act rules *regardless of where a contractor performs services*. Recipients of funds through the Community Development Block Grant program or other programs under the jurisdiction of HUD or HHS are similarly subject to Davis–Bacon.[33]

Thus, if you receive federal funds, you should check the specific rules in your award letter regarding Davis–Bacon applicability. Some programs modify the type of compliance that is required. For example, certain environmental statutes dealing with emergency clean-ups, reference Davis–Bacon but make exceptions for certain circumstances and certain grantees.[34] Others, require only that you comply with Davis–Bacon to the extent it applies. This "assurance" rule merely requires that you follow Davis–Bacon if it applies under either scenario 1 or 2, above.

Davis-Bacon Implications for Volunteer Programs

If your program is subject to Davis-Bacon Act requirements, you must pay affected workers the prevailing wage in your community, as determined by the Department of Labor, for the work they are doing. If you violate the Davis-Bacon Act, you can be subject to a variety of fines and penalties specified under the Act and the regulations. These penalties can apply whether or not you, or the workers doing the construction, etc., are working on behalf of a "prime contractor" or a "secondary contractor." Moreover, if your funding agreement requires compliance, you can also lose your funding.

Programs that are potentially subject to Davis-Bacon have developed several strategies to give their participants meaningful opportunities closely related to construction, maintenance, etc., once they have obtained assurances of the local contracting/granting agency and representatives of organized labor that specific projects do not require payment of prevailing wage. For example, service corps have accomplished a range of low income neighborhood projects such as installing play structures, landscaping, renovating recreational facilities, sprucing up urban parks and community gardens, planting trees, and removing graffiti. In each of these cases, the service program sought local determinations from federal authorities to insure that the work contemplated was exempt from Davis-Bacon. In addition, projects involving less than $2,000 are exempt.

A few organizations have been able to tap into Community Development Block Grant "Social Service" funding rather than funding for capital improvements. The "Social Service" rules do not impose Davis-Bacon Act requirements. Some programs use federal funds only for project materials and tools and not for personnel working in connection with low income housing renovations. Another strategy is to seek to have a program judged to be a pre-apprenticeship program, as in the case of the HUD Step-Up program, so as clearly to permit the payment of wages below prevailing wage.

In all cases, a project that plans to use volunteers for construction, etc., needs to attend to Davis-Bacon applicability in advance. The project funders can be consulted about their

specific requirements and the federal and state labor departments can be asked for an advance determination. Experience has shown that local unions' approval of the project can improve the prospects of a favorable ruling.

Union Rules

Volunteers should not be used to displace union workers. Not only should an organization with a unionized workforce be careful about using volunteers in day-to-day activities, it should also be very careful about whether and in what circumstances it plans to use volunteers in connection with union activity, such as organizing a workforce. If you plan to use volunteers in connection with union activity (whether on behalf of labor or management), you should carefully coordinate your plans with labor counsel since this area is fraught with regulation.[35]

Union rules and regulations depend not only on various situations but on the type of industry, employers and locations. In addition, each collective bargaining agreement may contain restrictions on the use or management of volunteers.

Non-citizens

Laws prohibiting employment of aliens who are not lawfully present in the United States do not apply to unpaid volunteers *per se*. That is, you need not verify citizenship status of any individual engaged in traditional volunteer activities. Even if you are aware that someone in your volunteer program is in this country illegally, you are not required to inform the authorities.

Congress enacted the Immigration Reform Land Control Act of 1986[30] in response to concerns that illegal aliens were replacing United States citizens in paid jobs. Its requirement that employers obtain proof of citizenship or work authorization ordinarily has no relevance to volunteer positions.

Paying a volunteer in any form, however, or using a volunteer to perform a task that displaces a paid worker, may trigger the Immigration Reform Act's rules. In the absence of guidance on this issue from the Immigration and Naturalization Service, you can refer to the rules described above for determining whether someone is an employee for purposes of the Fair Labor Standards Act. If so, the Immigration and Reform Act requirements undoubtedly apply. Considering the purposes of immigration control law, a good rule of thumb would be to follow its requirements if the volunteer's service would deprive any U.S. citizen of an economic opportunity. Moreover, because non-citizens without work permits are especially vulnerable to exploitation, any element of coercion in their volunteer service may trigger government intervention.

Programs receiving federal funds under a few programs may be required to check the citizenship status of volunteers or service recipients. If you are subject to such a requirement, your grant award notice should set forth that limitation.

Conclusion

Reading this booklet may leave you somewhat uncertain about the permissibility of using volunteers in some situations. Most of the laws examined in this booklet were designed to protect workers' wages and certainly were not passed to inhibit volunteering, an effect that was probably never considered at the time of enactment.

Consequently, the applicability of these laws in some circumstances may be unclear. Good arguments support the side of application as well as the side of exemption. Until the courts rule on these issues—which will happen only if someone sues—the uncertainty will continue. This booklet should at least provide some assistance for deciding how to proceed in the absence of such clarification.

Footnotes

These footnotes are intended for lawyers who need legal citations for the discussions in the text.

[1] Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 270 at 303 (1985) n.25. Citing *Wage and Hour Division, United States Department of Labor, Employment Relationship under the Fair Labor Standards Act* (W.H. Pub. 1297)(1985) p.6 (hereinafter cited as *Employment Relations Supplement*).

[2] Failure to comply with FLSA wage, hour and child labor standards can result in civil and criminal liability, 29 U.S.C § 216.

[3] 29 U.S.C. § 20(e) and (r).

[4] 29 U.S.C. §§ 203(e)(1) and 203(g). Dunn, Leda E., "Protection of Volunteers Under Federal Employment Law: Discouraging Voluntarism?," 61 *Fordham Law Review*, 451, 455 (1992).

[5] 29 C.F.R. §§ 553.100 et seq.

[6] *Employment Relations Supplement at 6-7.*

[7] *Employment Relations Supplement* at 7.

[8] Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985); Souder v. Brennan, 367 F. Supp. 808 (D.C. Cir. 1973); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir. 1954); cert denied, 347 U.S. 1013 (1954).

[9] *Employment Relations Supplement* at 4-5, 29 C.F.R. § 520.2(1).

[10] 29 C.F.R. § 553.106(d) .

[11] 29 C.F.R.§ 553.106(f).

[12] Department of Labor, *Field Operations Handbook*, FOH Insert #1626, pp. 10b12 - 10b14, 3/31/82.

[13] 471 U.S. 290 (1985).

[14] See also, Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947); Bartels v. Birmingham, 332 US 126, 130 (1947); United States v. Silk, 331 US 704, 713 (1947); Brock v. Superior Child Care Inc., 840 F.2d 1054, 1058-59 (2d cir. 1988) (citing United States v. Silk, 331 U.S. 704, 713 (1947)).

[15] 471 U.S. at 301-02. Indeed, the Court held that the Act's very purpose is to protect employees who may be forced to testify that they were working voluntarily.

[16] 471 U.S. 302-03. See also, McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

[17] WH-369, Dec. 3, 1975. See also, WH-282, Aug. 12, 1974; WH-188, Dec. 27, 1972

[18] 29 U.S.C. § 204(5)(a)(A); 29 C.F.R. § 553.10(d).

[19] 29 U.S.C. § 203(s); 471 U.S. at 295-96. Furthermore, an enterprise, to fall within the Act, must satisfy a dollar volume of sales made or business done annually. This amount is determined on a quarterly basis by the Department of Labor.

[20] The legislative history of the FLSA and subsequent amendments make it clear that Congress intended to include nonprofit organizations in the definition of "employer" or "enterprise." Indeed, on two occasions, Congress explicitly rejected proposals to exempt nonprofit organizations from FLSA coverage. See Milani, Lisa M, "The Applicability of the Fair Labor Standards Act to Volunteer Workers at Nonprofit Organizations," 43 *Washington & Lee Law Review* 223,235-36 (1986); Jordan, Kelley, "FLSA Restrictions on Volunteerism: The Institutional and Individual Costs in a Changing Economy," 78 *Cornell Law Review*. 302 (1993).

[21] 29 U.S.C. § 213(a) (2) (iii) (1982); 29 U.S.C. §§ 203 (r) - (s) (1982); [6 Wages-Hours] *Labor Relations Reporter* (BNA) 91:1177 (1977); see also, [6 Wages-Hours] *Labor Relations Reporter* (BNA) 91:1198-1200 (1976).

[22] Although no specific statutory exception exists, several cases and Advisory Opinions issued by the Wage and Hour Administrator of the U.S. Department of Labor acknowledge this exception to the general rule. See, Tony and Susan Alamo Foundation, 471 U.S. at 299, Wagner v. Salvation Army, 660 F. Supp. 466 (E.D. Tenn. 1986); Opinion letters No. 1040 (November 18, 1969) and 927 (May 29, 1968), WH-377 (March 10, 1976).

[23] 29 U.S.C. § 213(a)(1); see also Minimum Wages and Overtime Pay, 235 *Lab. L. Rep.* 11 (CCH) (April 5, 1991).

[24] 40 U.S.C. § 276(a) *et seq*, as amended.

[25] The "prevailing wage" for any given locality in the United States is determined by the United States Department of Labor and varies by geographic region. Note that here, as with the federal Fair Labor Standards Act, it is not the intent or title of the worker but the nature of the work being performed that is the operative factor. The Act and related statutes also contain extensive recordkeeping, overtime and method of payment provisions.

[26] The only States *without* a parallel Davis–Bacon Act covering various types of state projects are Georgia, Mississippi, North Carolina, South Carolina, Virginia, Iowa, North Dakota, South Dakota and Vermont. *See also*, Warner, Senator John W., "Congressional and Administrative Efforts to Modify or Eliminate the Davis–Bacon Act," 10 *Western State Law Review* 1 (Fall 1982).

[27] The Davis–Bacon Act is enforced by the United States Department of Labor, Employment Standards Administration (ESA), Wage and Hour Division, Office of Government Contract Wage Standards

(Wage and Hour Division). The contracting agency responsible for a particular project has the primary responsibility for enforcement of the Davis-Bacon Act. However, the Department of Labor has the coordinating and oversight responsibility and the authority to ensure uniform enforcement of the Act by all relevant agencies. Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix, 64 Stat. 1267.

[28] 40 U.S.C. § 276a.

[29] C.F.R. § 5.2(k).

[30] See, Re: Labor Services, Inc., (1991 WAB) CCH Wage and Hour Admin. Rulings ¶3221; 18 Comp. Gen. 341, as cited in Opinion Letter of the Secretary of Labor No. DB-26. P. 102-E, CCH Wage and Hour Administrative Rulings ¶30647 (1962).

[31] Over fifty federal statutes reference the Davis-Bacon Act. See, for example, Housing and Community Development Act of 1974, §§ 110, 802(g) and various housing and community development acts including the Community Development Block Grants. Some statutes also expressly state that the Davis-Bacon Act does not apply, e.g., the Job Training Partnership Act.

[32] Domestic Volunteer Service Act, 42 U.S.C. § 5046.

[33] Housing and Community Development Act of 1974, §§ 110, 802(g).

[34] See, Re Motco Hazmat Site 1991, WAB, CCH Wage-Hour Administrative Rulings, ¶ 31246; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9604(g)(1).

[35] Federal labor law includes statutes such as the Wagner Act, The Labor Management Relations Act, and The Norris LaGuardia Act. Both the Department of Labor and the National Labor Relations Board have jurisdiction over various matters involving organized labor and labor-management relations.

[36] 8 U.S.C. § 274 et seq.

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